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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL VENIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 06A01-0803-CR-136
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Rebecca S. McClure, Judge
Cause No. 06D02-0608-MR-730

September 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Michael Venis appeals his conviction, after a trial by jury, of murder.

We affirm.

ISSUES

1. Whether the trial court abused its discretion when it admitted Exhibit 26, a photograph of the shotgun blast injury to the victim's head.

2. Whether the trial court abused its discretion when it refused to instruct the jury regarding the offense of voluntary manslaughter.

FACTS

Venis married his wife Cindy in 1984. They had four daughters. In October of 2005, Cindy told Venis that she wanted a divorce. During the following months, both Venis and Cindy informed their daughters that Cindy wanted a divorce. There were frequent arguments between Venis and Cindy. Venis often expressed displeasure "about her being with somebody else." (Tr. 114). In the summer of 2006, Venis and Cindy were living at 609 South Lebanon Street in Lebanon with three of their daughters: Tiana, the eldest; Sherri; and Tasha, the youngest.[1]

In late July of 2006, Venis had called his friends, the Morleys, threatening to "kill himself or Cindy or both," to "either take his life or hers." (Tr. 499, 525). The Morleys went to Venis and Cindy's home. There, other friends of the Venis couple, the Lewises, were also present as Venis raged at Cindy outside the home. Venis was yelling and screaming that he did not want a divorce and calling Cindy obscene names. The four

[1] At the time of trial, in October of 2007, Sherri was eighteen years of age, and Tasha was seventeen years of age. The second-born of the Venises' four daughters, Julie, was living elsewhere in August of 2006.

friends calmed Venis, and all went inside the Venis home. Then Venis "got[] mad again," and walked out the door from the kitchen to the garage, returning with a sawed-off shotgun. (Tr. 530). Venis brandished the shotgun, then opened it to show Cindy that it was loaded -- an action causing the shell to eject. Cindy "grabbed [the shell]," and "they started wrestling over it." *Id.* Cindy told the friends to leave, and they did.

On the night of August 10, 2006, Venis went to a pub in Lebanon. Cindy came home but then went to the pub shortly after 8:00 p.m. Venis and Cindy drank and played pool. Near midnight, they left the pub. Sherri saw her mother leaving the pub and rode home with Cindy. At the house, Venis and Cindy sat in his car and talked for a while, then came inside. Cindy sat down in the kitchen, but Venis walked through to the living room. Tiana, who was seven months pregnant at the time, was sleeping on the couch there. Venis "scream[ed]" at Tiana "that we needed to talk about somethin'," and that she should come to the kitchen. (Tr. 188). Tiana went to the kitchen, where Venis was yelling "that he [was] not her dad," and that Cindy was "a bitch" and "a slut." (Tr. 190, 158).

Sherri took Tasha for a walk, to get her out of the house. Venis and Cindy yelled at each other about Venis' belief that he was not Tiana's father. Cindy "was yelling you'll be sorry when the paternity test comes back that you ever brought this up." (Tr. 192). Venis responded by shoving Cindy "out of her chair." *Id.* With Cindy on the floor, Tiana got between them and told Venis to leave her mother alone. Venis went out the door to the garage and came back in with a shotgun. Cindy was yelling that Tiana was "hysterical" and Venis "need[ed] to stop" or she would "lose that baby." (Tr. 195).

Venis "was yelling at her that she was a slut, stupid slut." (Tr. 197). Sobbing into a tissue against her eyes, Tiana heard a "click" and then a "pop." *Id.*

Tiana saw her mother lying on the floor with her head against the wall and blood dripping down the wall, and her dad standing there "holding the gun." (Tr. 199). Tiana "grabbed the phone to call 9-1-1-," and Venis "yanked it out of [her] hand." (Tr. 199, 202). Venis said, "The bitch got what she deserved." (Tr. 203). Tiana ran from the house, to call for help from the neighbor's; she saw Venis drive away.

Venis was subsequently apprehended in Brownsburg. On August 14, 2006, the State charged Venis with murder.[2]

A jury trial was held October 16 – 19, 2007. The jury heard evidence of the above. Dr. Joseph Czaja, the pathologist who conducted the autopsy of Cindy, testified that she died from a single shotgun injury of the head. According to Dr. Czaja, the shot hit the left side of her head between the eye and the ear, tearing through her skull, and exiting with "a large and gaping" exit wound and "brain matter . . . coming out of the wound." (Tr. 483). Dr. Czaja testified that muzzle stamping, from a gun held "up against the head in a near, very near contact or close contact" with Cindy's head, left a visible "impression of the gun." (Tr. 480, 478). Dr. Czaja testified that Exhibit 26 showed the brain matter extruded as a result of the injury.

Venis took the witness stand and testified that he had "pointed" the gun at Cindy after she "kept hollerin'" at him, pulled the hammer back "to get her attention," and then

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[2] The State also charged Venis with one count of dealing in a sawed-off shotgun, but that charge was subsequently dismissed.

"tapped [her] on the temple with the end of the barrel." (Tr. 626, 625, 626). According to Venis, the gun then accidentally "went off." (Tr. 638).

The jury found Venis guilty of murder. Subsequently, the trial court sentenced him to serve a term of fifty-five years.

DECISION

1. Admission of Evidence

Venis argues that the trial court abused its discretion when it admitted Exhibit 26, a photograph of the exit wound area of Cindy's head, despite his objection "on the basis of Rule 403 prejudice." Venis' Br. at 12. He argues that it "serve[d] no purpose other than to inflame the passions of the jurors," and had "no function as an interpretive aid for the jury" and "very little probative value." *Id.* We cannot agree.

The trial court has inherent discretionary power in the admission of evidence. *McManus v. State*, 814 N.E.2d 253, 264 (Ind. 2004). Its decision to admit evidence is reviewed only for an abuse of discretion. *Id.* The trial court's discretion extends to its admission of photographic evidence. *Lee v. State*, 735 N.E.2d 1169, 1172 (Ind. 2000). Thus, although "a photograph may arouse the passions of the jurors, it is admissible unless 'its probative value is substantially outweighed by the danger of unfair prejudice.'" *Id.* (quoting Ind. Evidence Rule 403). Photographs "depicting matters that a witness describes in testimony" are generally admissible, *id.*, as are photographs "depicting the victim's injuries." *Kubsch v. State*, 784 N.E.2d 905, 923 (Ind. 2003), *cert. denied*.

Here, Dr. Czaja testified to specific facts of the shotgun injury that were depicted in Exhibit 26 – the "large gaping injury of the head . . . through which brain matter" extruded, an exit wound resulting when shotgun pellets "basically shattered the skull" and "ripp[ed] up the . . . right back part of the head." (Tr. 473, 479). Further, although other photographs depicted Cindy's position after being shot – slumped against the wall, that position only shows the side of her head where the shot entered; because of her position against the wall, the full nature and extent of her head wound are not seen. Exhibit 26 depicts the exit wound area of her head. Because the exhibit depicts matters described by Dr. Czaja in his testimony and specifically depicts the victim's injuries, we find no abuse of discretion in the trial court's admission thereof. *Lee*, 735 N.E.2d at 1172; *Kubsch*, 784 N.E.2d at 923.

2. Instruction

Venis also argues that the trial court erred when it refused to give the jury his tendered instruction regarding the offense of voluntary manslaughter. Again, we cannot agree.

"The matter of instructing a jury lies largely within the discretion of the trial court, and we will reverse only for abuse of discretion." *Morgan v. State*, 759 N.E.2d 257, 263 (Ind. Ct. App. 2001). When determining whether a trial court erroneously refused to give a tendered instruction, we consider whether the tendered instruction correctly states the law; "whether there was evidence presented at trial to support giving the instruction"; and whether the substance of the instruction was covered by other instructions that were given. *Id.*

Further, we apply a three-part test for determining when a trial court should instruct on a lesser included offense. *Id.* The first two parts of the test require the determination of whether the lesser offense is either inherently or factually included in the offense charged. Voluntary manslaughter is an "inherently lesser-included offense of murder." *Id.* at 264 (citing *Horan v. State*, 682 N.E.2d 502, 507 (Ind. 1997)).

Therefore, we proceed to "part three" of the test, which

> requires the court to determine whether a serious evidentiary dispute exists as to which offense was committed by the defendant, given all the evidence presented by both parties. If a serious evidentiary dispute exists, it is reversible error not to give the instruction on the inherently . . . included lesser offense. The test for whether there is evidence before the jury that the included offense was committed hinges on whether a serious evidentiary dispute exists with respect to the element that distinguishes the greater and lesser offenses. The evidence must be such that the jury could conclude that the lesser offense was committed and the greater offense was not.

Id. at 263.[3]

With respect to the offenses of murder and voluntary manslaughter, "sudden heat is a mitigating factor that reduces murderous activity from murder to voluntary manslaughter." *Id.* at 264 (citing *Horan*, 682 N.E.2d at 507). The "sudden heat" is "an evidentiary predicate that allows mitigation of a murder charge to voluntary

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[3] Venis submitted to the trial court an instruction on the offense of voluntary manslaughter as both a preliminary and a final instruction. Our reading of the record reflects that he only argued to the trial court for it to give the preliminary instruction. During that discussion, before the trial commenced, the trial court held that, consistent with *Wright v. State*, 658 N.E.2d 563 (Ind. 1995), "the Court must look at the evidence presented by both parties to decide whether there is a serious evidentiary dispute about" the element distinguishing the offenses, and held "that it [was] premature to give" the instruction on voluntary manslaughter as a preliminary instruction. (Tr. 86). We find no indication in the record that after the presentation of evidence, Venis brought to the trial court's attention his desire for a final instruction on the offense of voluntary manslaughter. Hence, the trial court never expressly considered whether the evidence warranted the instruction submitted by Venis. Nevertheless, we address his appellate argument on appeal.

manslaughter." *Dearman v. State*, 743 N.E.2d 757, 760 (Ind. 2001). Sudden heat "is characterized as anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary person, preventing deliberation and premeditation, excluding malice, and rendering a person incapable of cool reflection." *Id.*

Venis directs us to no specific evidentiary dispute. He notes that perhaps "long-standing problems" could have precipitated sudden heat, and cites "statements by Mike Venis that if his wife filed for divorce, he would kill either herself or both." Venis' Br. at 14. However, we cannot conclude that "long-standing problems" constitute evidence of sudden heat. Further, Venis' own testimony established that Cindy had not filed for divorce.

Nothing in the testimony of Venis or of any other witness indicates that in the kitchen of their home that night, Venis experienced such an eruption of sudden emotion that he was rendered "incapable of cool reflection." *Dearman*, 743 N.E.2d at 760. Further, as the State properly notes, Venis' defense at trial was that the shotgun had accidentally fired – not that he had been so consumed with an anger, rage, or resentment that would have obscured the reason of an ordinary person. *Id.* Venis asserted to the jury that he "ought to be convicted of" reckless homicide. (Tr. 663).

There was no appreciable evidence of sudden heat. Therefore, the trial court did not abuse its discretion when it refused to instruct the jury on the offense of voluntary manslaughter.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.